90-1239

Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1991

THE UNITED ASSOCIATION OF BLACK LANDSCAPERS, EDDIE MARTIN, THOMAS WYNN, HAROLD BURRIS, LLOYD MAYWETHER, JOSE ROSALES, CHARLES BURTON, RUFUS POWELL, JOHN DOE, and JANE DOE, and THOMAS H. WYNN, JR.,

Petitioners,

vs.

CITY OF MILWAUKEE, DEPARTMENT OF PUBLIC WORKS, BUREAU OF FORESTRY of the City of Milwaukee, ROBERT SKIERA, City Forester for the City of Milwaukee, RICHARD MEYER, Assistant City Forester for the City of Milwaukee, JOHN NORQUIST, Mayor of the City of Milwaukee, E. FRANK BRIDGES, President, Board of City Service Commissioners of the City of Milwaukee, CITY SERVICE COMMISSION OF THE CITY OF MILWAUKEE,

Respondents.

PETITION FOR WRIT OF CERTIORARI FROM THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

1. Is the opinion of the United States Court of Appeals for the Seventh Circuit contrary to established principles of summary judgment in cases involving allegations of racial discrimination in municipal employment? Does the opinion misinterpret **Wards Cove Packing Co. v. Antonio**, 109 S.Ct. 2115 (1989)?

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"Summary judgment is to be sparingly granted especially in civil rights actions." **Howard v. Topeka Shawnee,** 578 F.Supp. 534 at p. 536 (D.C. Kansas 1983).

"Summary Judgment is a lethal weapon and courts must be mindful of its aims and targets and beware of overkill in its use." **Brunswick Corp. v. Vineberg,** 370 F.2d 605 at p. 612 (5th Cir. 1967). 3

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Respondents.

PETITION FOR WRIT OF CERTIORARI FROM THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Seventh Circuit decided October 29, 1990.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is set out in the Appendix at pp. 1-14.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

42 U.S.C. § 1983:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

42 U.S.C. § 1981:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

Title VII:

> "It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1)(2).

STATEMENT OF THE CASE

The petitioners are the United Association of Black Landscapers and individual members thereof. The particular plaintiffs in the case are Mr. Thomas Wynn and Mr. Eddie Martin. Mr. Wynn filed an action in the Circuit Court for Milwaukee County on December 2, 1988 alleging that the failure to promote him was racially inspired. That state action was removed by the respondents to the United States District Court and consolidated with an action which had been filed in the District Court by the Association and seven named plaintiffs in October of 1988 also alleging discrimination against them in their employment because of their race. A Motion for Class Certification was submitted in February of 1989 but that motion was never acted upon as the case progressed. Ultimately the respondents presented a Motion for Summary Judgment and after the submission of affidavits and briefs the District Judge granted the Motion for Summary Judgment. An appeal was taken therefrom to the United States Court of Appeals for the Seventh Circuit and that Court affirmed the grant of the summary judgment by its Opinion and Decision of October 29, 1990. (App., pp. 1-14.)

REASON FOR GRANTING THE WRIT

I.

THE OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT ERRONEOUSLY INTERPRETS WARDS COVE AND IS CONTRARY TO ESTABLISHED AUTHORITY WITH RESPECT TO DETERMINATION OF SUMMARY JUDGMENT.

"Summary judgment is to be sparingly granted especially in civil rights actions." **Howard v. Topeka Shawnee,** 578 F.Supp. 534 at p. 536 (D.C. Kansas 1983).

"Summary Judgment is a lethal weapon and courts must be mindful of its aims and targets and beware of overkill in its use." **Brunswick Corp. v. Vineberg,** 370 F.2d 605 at p. 612 (5th Cir. 1967).

The disposition of the case at bar by summary judgment on behalf of the defendants and the affirmance thereof by the Court of Appeals for the Seventh Circuit is contradictory to elementary principles governing summary judgment in civil rights actions. The violation of those principles is best seen from a careful review of the pleadings and the four evidentiary affidavits submitted by the petitioners in opposition to the motion for summary judgment.

What is significant from the pleadings are the facts asserted therein and the claims made. First of all, reviewing the Complaint that was filed on behalf of the Association in the United States District Court clearly reflects that the action was brought on behalf of a class of minority race employees of a Bureau of the City of Milwaukee. It recited specific claims of discrimination beginning at paragraph 20 and continuing through paragraph 31 and asserted as jurisdictional bases Title VII and 42 U.S.C. §§ 1981 through 1985. With respect to the Title VII claim it presented exhaustion through the EEOC on behalf of one of the members of the Association, Eddie Martin. The Complaint filed on behalf of Thomas Wynn in the Circuit Court of Milwaukee County was accompanied by a Motion for Preliminary Injunction and was verified. That Verified Complaint asserted discrimination against Mr. Wynn by the respondents on the basis of Mr. Wynn's race in refusing to promote him to a position for which he was eminently qualified and which he had earned by virtue of competitive examinations. Mr. Wynn had also exhausted his administrative remedies with respect to Title VII.

In affirming the grant of summary judgment the Court of Appeals ignores the submissions of the petitioners, the

verified allegations in the Complaint and the assertions of fact made in the affidavits. It is only by ignoring those submissions that the Court can conclude that there are no material issues in dispute. It is significant that **Wards Cove** was not decided on a motion for summary judgment and neither were any of the predecessor cases involving discrimination on the basis of race in employment settings. This history was presented to the Court of Appeals and the predecessor cases noted, i.e., **Griggs v. Duke Power Co.**, 401 U.S. 424, 28 L.Ed.2d 158, 91 S. Ct. 849 (1971); **McDonnell Douglas Corp. v. Green**, 411 U.S. 792, 36 L.Ed.2d 668, 93 S.Ct. 1817 (1973); **Albermarle Paper Co. v. Moody**, 442 U.S. 405, 45 L.Ed.2d 280, 95 S.Ct. 2362 (1975); **Washington v. Davis**, 426 U.S. 229, 48 L.Ed.2d 597, 96 S.Ct. 2040 (1976); **Teamsters v. United States**, 431 U.S. 324, 335, n.15, 52 L.Ed.2d 396, 97 S.Ct. 1843 (1977); **Dothard v. Rawlinson**, 433 U.S. 321, 53 L.Ed.2d 786, 97 S.Ct. 2720 (1977); **Furnco Construction Corp. v. Waters**, 438 U.S. 567, 57 L.Ed.2d 957, 98 S.Ct. 2943 (1978); **Texas Department of Community Affairs v. Burdine**, 450 U.S. 248, 67 L.Ed. 207, 101 S.Ct. 1089 (1981); **Connecticut v. Teal**, 457 U.S. 440, 73 L.Ed.2d 130, 102 S.Ct. 2525 (1982); **United States Postal Service Bd. of Governors v. Aikens**, 460 U.S 711, 75 L.Ed.2d 403, 103 S.Ct. 1478 (1983); **Local 28 of the Sheet Metal Workers v. EEOC**, 478 U.S. 421, 92 L.Ed.2d 344, 106 S.Ct. 3019 (1986); **Watson v. Fort Worth Bank and Trust**, 487 U.S. 977, 101 L.Ed.2d 827, 108 S.Ct. 2777 (1988). Nothing in **Matsushita Electric Co. v. Zenith Radio**, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) holds to the contrary. As a matter of fact a close reading of **Matsushita** supports the conclusion that summary judgment was not appropriate in the case at bar. The Opinion of the United States Court of Appeals for the Seventh Circuit has resulted in a serious miscarriage of justice for the black employees of the Forestry Department of the City of Milwaukee and that miscarriage should be redressed.

CONCLUSION

For the foregoing reasons the Petition for Certiorari should be granted.

Respectfully submitted,

SUTTON & KELLY

By: Robert E. Sutton
Walter F. Kelly

Attorneys for Petitioners

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 90-1430

United Association of Black Landscapers, Eddie Martin, Thomas H. Wynn, Jr., Harold Burris, Lloyd Mayweather, Jose Rosales, Charles Burton, Rufus Powell, John Doe, and Jane Doe,

Plaintiffs-Appellants,

v.

City of Milwaukee, Department of Public Works, Bureau of Forestry, of the City of Milwaukee, Robert Skiera, City Forester for the City of Milwaukee, Richard Meyer, Assistant City Forester for the City of Milwaukee, John Norquist, Mayor for the City of Milwaukee, E. Frank Bridges, President, Board of City Service Commissioners of the City of Milwaukee, and City Service Commission of the City of Milwaukee,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 88-C-1144—**Thomas J. Curran,** *Judge.*

Argued July 11, 1990—Decided October 29, 1990

Before WOOD, JR., MANION, and KANNE, *Circuit Judges.*

MANION, *Circuit Judge.* Eddie Martin, Thomas Wynn, Jr., and other named and unnamed plaintiffs brought suit individually and as a class against the City of Milwaukee, the City's Bureau of Forestry, and various city employees and agencies, alleging racial discrimination in job promotion and transfer in violation of Title VII, section 1981 and section

1983. The district court entered summary judgment in favor of the defendants, and the plaintiffs appeal. We affirm.

I.

In the original complaint filed in federal district court, the plaintiffs alleged that the defendants had discriminated against them in promotions, salary, and hiring. Plaintiffs sought to represent a class of black employees of the Bureau of Forestry as well as individual employees of the Bureau. The complaint alleged that the Bureau intentionally restricted black employees to laborer positions and failed to promote qualified blacks to the supervisory ranks. Specifically, plaintiffs alleged that Eddie Martin, a twenty-eight-year employee of the Bureau, and other individual blacks with similar qualifications, had been repeatedly denied a promotion to supervisor. At the same time, it was alleged that less-qualified whites had been placed in the available supervisory positions. Plaintiffs also alleged that the jobs in comparable divisions of the Bureau filled predominantly by whites were paid higher salaries than those positions filled predominantly by blacks.

A second complaint was filed in state court by Thomas Wynn, Jr., one of the plaintiffs in the federal lawsuit. Wynn held agronomy and horticulture degrees from Tuskegee University and was employed in a nonsupervisory position with the Bureau. He alleged that he became eligible for promotion, took the promotion examination, scored extremely high, but was denied the promotion. He alleged that he was denied the supervisor's position because of his race. Wynn's state court suit was removed to federal court and later consolidated with the first suit.

In addition to the City of Milwaukee, Mayor John Norquist, and the Bureau of Forestry, the defendants also included: Robert Skiera, the City Forester and head of the Bureau; Richard Meyer, the Assistant City Forester; the Milwaukee City Services Commission, an agency responsible for fair employment practices; and E. Frank Bridges, the President of the City Services Commission.

After the two cases were consolidated, the defendants filed a motion for summary judgment, attaching the depositions and affidavits of numerous witnesses. Among those deposed were Martin and Wynn; Martin essentially reiterated the facts that formed the basis of the first complaint, while Wynn made additional allegations regarding his discrimination claim. The defendants also submitted the affidavit of an expert witness, Dr. David Friedland, who determined that the employment figures showing exclusively white supervisors in the Bureau failed conclusively to demonstrate disparate impact. According to Friedland, because so few blacks had applied for these positions over the years, any disparate impact analysis could be uncertain because it would not produce statistically significant correlations.

Plaintiffs filed a cursory response to the summary judgment motion.[1] In their counter-motion, plaintiffs argued generally that summary judgment was a disfavored means of resolving race discrimination suits, and that they had made a showing sufficient to establish disputed issues of material fact, particularly with respect to the existence of statistical evidence of race discrimination. Despite defendants' strongly supported motion, plaintiffs apparently did not depose any witnesses for no deposition transcripts were attached to their response. Instead, plaintiffs attached the affidavits of Martin and Wynn, and an affidavit from their own statistical expert that called into question the defendants' statistical analysis.

In his affidavit, Martin stated that he had witnessed during his twenty-eight years of employment that the Bureau's management relegated blacks to the lowest paying jobs, denied blacks well-deserved promotions, used subjective

[1]The district court noted that on the day before the plaintiffs' response was due, they requested a summary denial of the defendants' motion or, in the alternative, an extension of time within which to file a response. The plaintiffs were allowed to file their response two-and-one-half months later. Even then, in response to what the district court described as the defendants' "voluminous motion...supported by numerous affidavits and twenty-eight depositions," the plaintiffs filed a four-and-one-half page brief.

testing procedures to disqualify blacks from certain positions, and under-compensated positions that had predominantly black employees. He also alleged that he had attempted to secure a passing score on the supervisor's test three or four times, but "was failed" each time.

Wynn stated in his affidavit that he had taken the supervisor's test in October 1987 and had placed second in the city on the eligibility list. This test was nullified, however, and Wynn stated that he was forced to re-take the written exam and submit to a "subjective" oral examination as well. Wynn stated that during the oral examination he was interviewed by people who "had nothing to do with the Bureau of Forestry and one of the persons who interviewed me was a past enemy of my father." After the second test, Wynn stated that he was placed twentieth on the eligibility list.

Plaintiffs' expert, Dr. Jack Stebbins, stated in his affidavit that Friedland's statistical analysis was subject to criticism. Stebbins did not perform his own independent analysis; he restricted his comments to a critique of Friedland's study. For example, Stebbins noted that although insufficient data existed to support a precise analysis of annual employment figures, this problem was eliminated if the employment figures from two or more years were aggregated. When this was done, according to Stebbins, the figures showed a statistically significant disparate impact on blacks with respect to the supervisory positions with the Bureau. We note, however, that Friedland did not aggregate employment figures in his analysis because he felt it was impossible to determine whether one minority employee represented numerous applications over the period of years. According to Friedland, repeated applications by the same black employee (or any employee for that matter) would render the analysis inaccurate.

The district court entered summary judgment in favor of the defendants. Relying on *Wards Cove Packing Co. v. Antonio*, 109 S. Ct. 2115 (1989), the judge held that, contrary to plaintiffs' assertions, it was proper to grant summary

judgment in discrimination cases where, as here, the plaintiff failed to establish a prima facie case of disparate impact. According to the court, plaintiffs failed to establish the existence of the causal link between the employer's employment practices and the fact that blacks were underrepresented in certain positions within the workforce. As to Wynn's individual claim, the court concluded that Wynn failed to establish the existence of a genuine issue of material fact with respect to the defendants' decision not to promote him to supervisor.

II.

On appeal, plaintiffs argue that the district court prematurely granted summary judgment for the defendants. They again contend that summary judgment is inappropriate in discrimination cases, claiming that "the traditional resolution of such lawsuits has been trial and decision on the merits." However, as an *en banc* panel of this court held in *International Union, UAW v. Johnson Controls,* 886 F.2d 871, 887-88 (7th Cir. 1989), *cert. granted,* 110 S. Ct. 1522 (1990),

> [t]he allocation of the burden of proof under substantive Title VII law...plays a significant role in summary judgment proceedings...."Summary judgment is properly entered in favor of a party when the opposing party is unable to make a showing sufficient to prove an essential element of a case on which the opposing party bears the burden of proof." *Commons v. Williams,* 859 F.2d 467, 469 (7th Cir. 1988).... "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.' " [*Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1988) (quoting *First Nat'l Bank v. Cities Serv. Co.,* 391 U.S. 253, 288-89 (1968))].

Thus, on each of the claims advanced in their consolidated suit, plaintiffs were required to make a showing sufficient to prove the elements of their claims. If they failed to make a sufficient showing, summary judgment was properly entered against them.

A. Disparate Impact

The plaintiffs sought to proceed on their class action claim under a disparate impact theory of race discrimination. They alleged, and the defendants admitted, that no black had ever served as a supervisor in the Bureau. It is clear that plaintiffs may use properly prepared statistical evidence to help establish a prima facie case of disparate impact. *Wards Cove,* 109 S. Ct. at 2121. We need not decide whether plaintiffs established this element of their case because plaintiffs in disparate impact cases are also " 'responsible for isolating and identifying *the specific employment practices that are allegedly responsible for any observed statistical disparities.*' " *Id.* at 2124 (quoting *Watson v. Fort Worth Bank & Trust,* 487 U.S. 977, 994 (1988) (emphasis added)). This element establishes the requisite causal link between the employer's actions and the existence of a statistically imbalanced work force. Without it, the plaintiff has not established a prima facie case of disparate impact. *Id.* at 2125.

The district court held that the plaintiffs had failed to identify any specific promotional practices that allegedly caused the racial disparity. Plaintiffs alleged that the written tests combined with oral interviews resulted in racial discrimination. These allegations, however, were not supported by specific facts demonstrating a triable issue; they were generalized and unsupported assertions. Yet the plaintiffs insist that "[t]he most significant oversight of the District Court is its refusal to acknowledge the facts pled in the verified *complaint* and the submissions of the four affidavits." (emphasis added). The plaintiffs misunderstand their burden in responding to a motion for summary judgment. As we have previously outlined,

> [t]o create a question of fact, an adverse party responding to a properly made and supported summary judgment motion must set forth specific facts showing that there is a genuine issue for trial. *See Macklin v. Butler,* 553 F.2d 525, 528 (7th Cir. 1977); Rule 56(e), Fed. R. Civ. P. *A party may not rest on mere allegations or denials of*

> *his pleadings; similarly, a bare contention that an issue of fact exists is insufficient to raise a factual issue. See Shacket v. Philko Aviation, Inc.*, 681 F.2d 506, 513 n.8 (7th Cir. 1982); *Whitfield v. Gangas*, 507 F.2d 880, 882 (10th Cir. 1974). Rule 56 of the Federal Rules of Civil Procedure clearly requires that an adverse party set forth specific facts showing a genuine issue for trial.

Posey v. Skyline Corp., 702 F.2d 102, 105 (7th Cir.), *cert. denied*, 464 U.S. 960 (1983) (emphasis added).

Thus, the facts alleged in plaintiffs' complaint have little relevance at the summary judgment stage. *Puckett v. Soo Line R.R.*, 897 F.2d 1423, 1425 (7th Cir. 1990) (reliance on facts pled in complaint to create disputed issues of material fact "wholly misplaced"); *Goldberg v. Household Bank*, 890 F.2d 965, 967-68 (7th Cir. 1989). The plaintiffs must go a step further and make a specific, supportable showing to defeat a motion for summary judgment. The affidavits plaintiffs filed in this case do nothing more than condense the facts alleged in the complaints. There were no additional facts to be gleaned from the affidavits—they simply reiterate the allegations of the original complaints without providing any factual support. In light of this fact, the district court properly granted summary judgment with respect to the disparate impact claims in the complaint.

B. Disparate Treatment

There remain the individual discrimination claims advanced by plaintiffs Martin and Wynn. In analyzing individual claims of race discrimination under Title VII,[2] the Supreme Court has stated that

[2] In *Patterson v. McLean Credit Union*, 109 S. Ct. 2363, 2377 (1989), the Court held that a claim that an employer failed to promote an employee due to race discrimination states a cognizable claim for relief under section 1981 if "the promotion rises to the level of an opportunity for a new and distinct relation between the employee and the employer." In our case, there are insufficient facts in the record to determine whether Martin or Wynn would have had a "new and distinct" contractual relationship with the Bureau. Given our affirmance of the district court's decision that the plaintiffs failed to carry their burden at the summary judgment stage, we need not reach this issue.

> [t]he burden of establishing a prima facie case of disparate treatment is not onerous. The plaintiff must prove by a preponderance of evidence that she applied for an available position for which she was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination. ....[T]he burden th[en] shifts to the defendant...to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, non-discriminatory reason.

Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253-54 (1981); *see also McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). Should the employer provide a nondiscriminatory justification for the employment decision, the plaintiff then must "demonstrate that the proffered reason was not the true reason for the employment decision....either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Burdine*, 450 U.S. at 256. Of course, if this issue requires weighing the credibility of witnesses or the facts in question, summary judgment is inappropriate. *See, e.g., Renovitch v. Kaufman*, 905 F.2d 1040, 1044 (7th Cir. 1990).

Martin's allegations of individual race discrimination boil down to a claim that, despite having the most seniority in the Bureau, he has repeatedly been denied a promotion because of his race. His allegations of discrimination, however, were undercut by his deposition testimony. At his deposition, he testified that he had taken the qualifying examination three or four times but had never received a passing grade. He felt that he should not have been required to take the objective test to receive a promotion because of a "grandfather clause" that allegedly applied to him and other employees who were employed with the City since 1960. Martin suggested at his deposition that the objective test be eliminated entirely, presumably to be replaced by a system of promotions based solely on seniority.

As the district court properly held, Martin's claim of individual discrimination failed because he did not meet his initial burden of establishing a prima facie case. Specifically, Martin failed to show that he was qualified for the position he sought. Although he alleged that the objective tests failed properly to measure the requirements of the supervisor job and that they were a "scam," these allegations went unsupported at the summary judgment stage. With no evidence that the objective testing procedure was discriminatory or had a discriminatory impact on blacks, the district court acted properly in entering summary judgment for the defendants on Martin's individual claim.

Wynn likewise pursued relief under an individual discrimination theory. Although Wynn's affidavit essentially repeats the general allegations in the complaint, he provided at his deposition additional facts in support of his claim that the persons in charge of hiring for the Bureau intentionally altered the evaluation process to prevent him from being promoted to supervisor. He stated at his deposition[3] that he had the second highest examination score in the city on the written exam, and that he should have been awarded the job because the person who scored first was ineligible for the supervisory position because he was not a resident of the city of Milwaukee. Wynn also stated that after he found out his score he spoke with Bob Skiera, the Bureau Chief. Skiera allegedly told Wynn that the Bureau was not required to hire the most qualified person for the job, namely Wynn. Instead, the Bureau could fill the supervisor position with a "warm body." Wynn also recounted in his deposition incidents in which management-level City employees

[3]We note that Wynn's full deposition testimony was not supplied to this court. The defendants deposed Wynn and other plaintiffs and submitted pertinent excerpts from these depositions in support of their motion for summary judgment. These excerpts, and additional materials defendants filed with their summary judgment motion, were supplied to us in the form of appendices to defendants' brief to this court. Plaintiffs, apparently having taken no depositions during the course of discovery, filed four affidavits with their response. Wynn makes no reference to the balance of his deposition for additional factual support.

expressed what he considered to be racist sentiments.[4]

This evidence, although sparse, was sufficient to shift the burden to the defendants to produce a "legitimate, non-discriminatory reason," *Burdine,* 450 U.S. at 254, for not hiring Wynn. This justification was offered in the deposition testimony of Skiera. According to Skiera, an eligibility list existed prior to the time Wynn took the supervisor exam. This list did not contain the names of any minorities, Skiera stated, so the Bureau decided to administer a second examination in the hopes of generating a minority candidate for the supervisor position. Skiera assumed that the pre-existing list and the list from the new examination could be merged to come up with a final eligibility list. After the examination, he merged the lists, and Wynn was placed second. It was later discovered, however, that, under the City's civil service rules, the members of the pre-existing list had absolute priority over the candidates on the second list, and therefore no minorities were eligible for promotion. To rectify this problem, Skiera testifed that *both* lists were abolished, and everyone who wanted to apply for the supervisor position would re-take the examination. This way, according to Skiera, a single list of eligibles would be generated—hopefully with qualified minorities among the top names. On this second examination, Wynn placed twentieth. Skiera's deposition testimony sufficiently "articulate[d] lawful reasons for the [employment] action." *Id.* at 257. Therefore, the burden remained with Wynn to "demonstrate pretext." *Id.* at 258.

Plaintiffs failed to establish that defendants' justification in this case was a pretext for race discrimination.

[4]For example, William Smithyman, a division head within the Bureau, allegedly told Wynn that Eddie Martin, a plaintiff in this case, was "one of the best straw bosses in the city." Wynn stated that he was unsettled by Smithyman's application of this "plantation term" to one of the Bureau's employees. In a second incident, Wynn recounted that before he was hired into his present position, he had attempted to secure a job with another division of the Bureau. When he was rejected for the job, he claims that the supervisor would give no other reason than that Wynn would not "fit in" with the group. Wynn explained that this meant that he would be the only black in the all-white work group and that the supervisor would therefore not offer him the job.

In fact, they offered no evidence on this point whatsoever. At oral argument, counsel for plaintiffs claimed that defendants never offered *any* explanation for abolishing the two eligibility lists. Skiera's deposition testimony, which certainly was available to plaintiffs, belies this contention. Plaintiffs would have us believe that Skiera's explanation was pretextual without offering any evidence to support such a conclusion. However, plaintiffs need to make a supportable showing of pretext to fend off a properly supported motion for summary judgment. Here, plaintiffs failed even to ascertain the nature of defendants' justification, let alone offer evidence suggesting that this reason was a pretext for race discrimination. They therefore failed to meet their burden of proof at the summary judgment stage.

In addition, Wynn testified that race may not have been a motivating factor in his lower placement on the second eligibility list. Wynn alleged that the panel that conducted the oral examination included a person who had a grudge against his father. When asked whether he remembered the names of the other panel members, Wynn replied

> No, I don't, with the exception of Will Hudson who had had problems with my father with the Association of Black Veterans who was basically ousted out of that organization. I did not know him, but I'm Tom Wynn, Jr., my father's Tom Wynn, Sr., and from checking out with Will Hudson—*he ranked me the worst. People gave me eights and nines; Will would give me a three,* and I think that he should not have been on that panel because—I did not know him, but once he went out to the street, he told people about he'd [sic] interviewed me and that and bla, bla, blue blue; so my point was that *Will Hudson who is a black individual, he was the most negative.*

Wynn does not allege that the defendants placed Hudson on the panel knowing that he would score Wynn low and thus keep him off of the eligibility list. From Wynn's own testimony it appears that his claim of race discrimination is actually a claim that one member of his evaluation panel

bore a personal grudge against him. Unfortunately for Wynn, a personal grudge does not equal race discrimination. As the district court stated,

> [t]he court is sympathetic with the situation of plaintiff Thomas Wynn, who is obviously a very qualified individual. The court must find, however, that there is no genuine issue of material fact with respect to the City's decision not to promote him to supervisor.

III.

Plaintiffs' repeated attempt to stave off a properly filed and thoroughly supported summary judgment motion with the argument that such judgments are disfavored merits a final comment. Plaintiffs misconstrue the concept that summary judgment in employment discrimination cases is " 'infrequently an appropriate resolution.' " *Holland v. Jefferson Nat'l Life Ins. Co.*, 883 F.2d 1307, 1312 (7th Cir. 1989) (quoting *Powers v. Dole*, 782 F.2d 689, 694 (7th Cir. 1986)). It is not always inappropriate simply because the case raises issues of motive and intent. *Holland*, 883 F.2d at 1312. Even in discrimination cases, parties should not be subjected to the time and expense of trial when there are no material issues in dispute. *Palucki v. Sears, Roebuck & Co.*, 879 F.2d 1568, 1572 (7th Cir. 1989) (the purpose of Rule 56 "is to head off a trial, with all the private and public expenses that a trial entails, if the opponent....of summary judgment does not have a reasonable prospect of prevailing before a reasonable jury"). Defendants filed a motion for summary judgment that was supported by numerous affidavits as well as deposition testimony of at least twenty-eight witnesses. Defendants hired a statistical expert to analyze employment data and submitted extensive employment histories and records. Plaintiffs, on the other hand, filed a four-and-one-half page response and attached four affidavits. Two of the affidavits, from Martin and Wynn, were simply restatements of the allegations in their complaints. Another was from plaintiffs' statistical expert, Stubbins. Unlike Friedland, defendants' expert Stubbins did not conduct his own study of the employment data; instead his affidavit is confined to

criticizing Friedland's conclusions and suggesting that the data could be interpreted differently.

While presumably relying on the hope that the district court would agree that they had an inherent right to a trial (notwithstanding the lack of any genuine material issues), plaintiffs failed to meet their burden at the summary judgment stage. As we noted in *Johnson Controls*, 886 F.2d at 888,

> [o]ur inquiry must be based on the underlying premise that the creation of a record adequate to meet legal challenges is the responsibility of the parties litigating the case...."A district court need not scour the record to make the case of a party who does nothing ....[C]ourts will not discover that the movants slighted contrary information if opposing lawyers sit on their haunches; judges may let the adversary system take its course." *Herman v. City of Chicago*, 870 F.2d 400, 404 (7th Cir. 1989).

Plaintiffs were responsible for building and supporting a record adequate to meet the challenge of defendants' strong summary judgment motion. Possibly the factual basis for a strong response was lacking; possibly plaintiffs simply failed to gather and organize a response adequate to preserve their day in court. Either way, plaintiffs were not entitled to subject the defendants to the cost of trial on the facts they presented. The district court therefore acted correctly in bringing this case to an end.

IV.

The disparate impact claim plaintiffs advanced in the district court was not properly supported at the summary judgment stage, and the district court did not err in entering summary judgment for defendants. Likewise, the court properly granted judgment on the individual claims of race discrimination. Martin failed to meet his prima facie case of discrimination, and Wynn failed to rebut the defendants' legitimate explanation for their employment decision.

Therefore, the decision of the district court granting summary judgment to the defendants on all claims is

AFFIRMED.

A true Copy:

Teste:

_____

Clerk of the United States Court of Appeals for the Seventh Circuit

90-1239

Supreme Court, U.S.
FILED
JAN 24 1991
OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1991

THE UNITED ASSOCIATION OF BLACK LANDSCAPERS, EDDIE MARTIN, THOMAS WYNN, HAROLD BURRIS, LLOYD MAYWETHER, JOSE ROSALES, CHARLES BURTON, RUFUS POWELL, JOHN DOE, and JANE DOE, and THOMAS H. WYNN, JR.,

Petitioners,

vs.

CITY OF MILWAUKEE, DEPARTMENT OF PUBLIC WORKS, BUREAU OF FORESTRY of the City of Milwaukee, ROBERT SKIERA, City Forester for the City of Milwaukee, RICHARD MEYER, Assistant City Forester for the City of Milwaukee, JOHN NORQUIST, Mayor of the City of Milwaukee, E. FRANK BRIDGES, President, Board of City Service Commissioners of the City of Milwaukee, CITY SERVICE COMMISSION OF THE CITY OF MILWAUKEE,

Respondents.

SUPPLEMENTAL APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI FROM THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

THE UNITED ASSOCIATION OF BLACK LANDSCAPERS, EDDIE MARTIN, THOMAS WYNN, HAROLD BURRIS, LLOYD MAYWEATHER, JOSE ROSALES, CHARLES BURTON, RUFUS POWELL, JOHN DOE, AND JANE DOE,

Plaintiffs, Case No. 88-C-1144

v.

CITY OF MILWAUKEE, DEPARTMENT OF PUBLIC WORKS, BUREAU OF FORESTRY of the City of Milwaukee, ROBERT SKIERA, City Forester for the City of Milwaukee, RICHARD MEYER, Assistant City Forester for the City of Milwaukee, JOHN NORQUIST, Mayor of the City of Milwaukee, E. FRANK BRIDGES, President, Board of city Service Commissioners of the City of Milwaukee, CITY SERVICE COMMISSION OF THE CITY OF MILWAUKEE,

Defendants.

THOMAS H. WYNN, JR.,

Plaintiff, Case No. 88-C-1336

v.

CITY OF MILWAUKEE, DEPARTMENT OF PUBLIC WORKS of the City of Milwaukee, ROBERT SKIERA, City Forester of the City of Milwaukee and JOHN O. NORQUIST, Mayor of the City of Milwaukee,

Defendants.

ORDER

The present action was commenced on October 31, 1988, by the United Association of Black Landscapers, an unincorporated group allegedly comprised of black employees of the City of Milwaukee, Bureau of Forestry, and various employees of the Bureau of Forestry against the City of Milwaukee, the Department of Public Works, Bureau of Forestry; Robert Skiera, the Chief Managing Officer and Director of that agency; Richard Meyer, the Assistant City Forester; the City Service Commission of the City of Milwaukee; and the President of its Board, E. Frank Bridges. The complaint purported to state claims under 42 U.S.C. § 1981, § 1983, § 1985(2) and (3), § 1988 and § 2000e-5(f)(2). The complaint was answered on November 22, 1988.

On December 2, 1988, Thomas Wynn, one of the plaintiffs in the federal action commenced an action in the Milwaukee County Circuit Court against the City of Milwaukee, Department of Public Works, Bureau of Forestry of the City of Milwaukee, Robert Skiera and John Norquist. Mr. Wynn was represented by the same attorney who represented him and the other plaintiffs in the federal action. This complaint alleged that the plaintiff was denied promotion due to his race. He further alleged that he had exhausted his administrative remedies and had received his Right to Sue letter. The defendants removed *Wynn v. City of Milwaukee* to federal court, requesting in the petition for removal that the two cases be considered together.

The court conducted a scheduling conference on January 19, 1989, at which time various deadlines were set for discovery matters and dispositive motions. A final pretrial conference was scheduled for February 28, 1990, and four trial dates were scheduled for March, April, June and August of 1990. On February 6, 1989, the parties stipulated that the two actions could be consolidated and it was so ordered by the court on the following day. On September 5, 1989, the plaintiffs submitted their witness list stating they intended to call the named plaintiffs, Eddie Martin, Thomas Wynn, Harold Burris, Lloyd Mayweather, Jose Rosales, Charles Burton and Rufus Powell in addition to Cora Mason, Helen

Renfro, a records custodian and their expert witness, Dr. J. L. Stebbins, a data analyst and statistician.

On November 1, 1989, the defendants filed a voluminous motion for summary judgment. The motion, which is supported by numerous affidavits and twenty-eight depositions, arrived in chambers in a shopping cart. On the day before a response from the plaintiffs was due they filed a motion for an order summarily denying the motion for summary judgment or, in the alternative, modifying the scheduling Order.

The motion to deny the summary judgment motion was denied but the plaintiffs were given a generous extension of time to respond. The four-and-a-half page opposing brief was filed on January 16, 1990, fully two-and-a-half months after the summary judgment motion was filed. Essentially the plaintiffs argued that summary judgment is inappropriate in Title VII cases. The brief string cited the "thirteen definitive" Title VII cases decided by the Supreme Court[1] concluding that "[w]hat emerges clearly from a reading of these cases is that the high court does not favor resolution of claims of institutional racial discrimination in employment practices by summary judgment." (Plaintiffs' Brief at page 2) The brief further points out that in most of the cited cases the matter had been fully tried at the district court level.

[1] *Griggs v. Duke Power Co.*, 401 U.S. 424, 28 L.Ed.2d 158, 91 S. Ct. 849 (1971); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 36 L.Ed.2d 668, 93 S. Ct. 1817 (1973); *Albermarle Paper Co. v. Moody*, 442 U.S. 405, 45 L.Ed.2d 280, 95 S. Ct. 2362 (1975); *Washington v. Davis*, 426 U.S. 229, 48 L.Ed.2d 597, 96 S. Ct. 2040 (1976); *Teamsters v. United States*, 431 U.S. 324, 335, n.15, 52 L.Ed.2d 396, 97 S. Ct. 1843 (1977); *Dothard v. Rawlinson*, 433 U.S. 321, 53 L.Ed.2d 786, 97 S. Ct. 2720 (1977); *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 57 L.Ed.2d 957, 98 S. Ct. 2943 (1978); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 67 L.Ed. 207, 101 S. Ct. 1089 (1981); *Connecticut v. Teal*, 457 U.S. 440, 73 L.Ed.2d 130, 102 S. Ct. 2525 (1982); *United States Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 75 L.Ed.2d 403, 103 S. Ct. 1478 (1983); *Local 28 of the Sheet Metal Workers v. EEOC*, 478 U.S. 421, 92 L.Ed.2d 344, 106 S. Ct. 3019 (1986); *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 101 L.Ed.2d 827, 108 S. Ct. 2777 (1988) and *Wards Cove Packing Co. v. Atonio*, _____ U.S. _____, 104 L.Ed.2d 733 (1989).

The plaintiffs go on to argue that statistical evidence may be probative of a discriminatory employment practice and where, presumably as here, the claim is that the testing is discriminatory all aspects of the testing procedure may be relevant at trial. They proceed with the proposition that a situation in which the majority of blacks hold lower paying jobs is relevant and that plaintiffs are not required to submit direct evidence of discriminatory intent. From these premises the plaintiffs arrive at the "inescapable conclusion" that summary judgment must be denied.

Without giving the court any guidance in the brief, the plaintiffs have submitted portions of the depositions previously submitted by the defendants of the following black employees, most of whom were not even named as potential witnesses: Rufus Powell, Torrence Brunson, Charles Burton, Dale Robbins, Albert Henry, Charles Ruffin, Jeffrey Smith, Arthur Ellis, William Pulliam, Donald Davis and Johnnie Green. The plaintiffs have also submitted the affidavits of Thomas Wynn, Eddie J. Martin, Jr. and their expert witness, Jack L. Stebbins. Finally, there are three exhibits with a breakdown by race of the Bureau of Forestry for the pay periods of November 6, 1987, January 6 and 7, 1987, and June 6 and 8, 1988.

Despite plaintiffs' protestations to the contrary, court's routinely and properly grant summary judgment to defendants in Title VII cases. In the recent case of *International Union, UAW v. Johnson Controls, Inc.*, 886 F.2d 871 (7th Cir. 1989), the Seventh Circuit explained the tasks of the parties and the court as follows:

> The allocation of the burden of proof under substantive Title VII law outlined in *Wards Cove* plays a significant role in summary judgment proceedings of this nature. We have previously recognized that: "Summary judgment is properly entered in favor of a party when the opposing party is unable to make a showing sufficient to prove an essential element of a case on which the opposing party bears the burden of proof." *Common v. Williams*, 859 F.2d 467, 469 (7th Cir. 1988). The Supreme Court explained the reasons for this rule in *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23,

106 S. Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986):

> "In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which the party will bear the burden the proof at trial. In such a situation, there can be 'genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is 'entitled to judgment as a matter of law' because the nonmoving party has failed to make a sufficient showing on all essential element of her case with respect to which she has the burden of proof."

"Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.' " *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L.Ed.2d 538 (1986) (quoting *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 288-89, 88 S. Ct. 1575, 1592-93, 20 L.Ed.2d 569 (1968)). Thus, the question we must address is whether the UAW, which bears the burden of persuasion, has presented evidence sufficient to permit the district court to conclude that Johnson Controls' business necessity defense cannot be factually supported.

[4] Our inquiry must be based on the underlying premise that the creation of a record adequate to meet legal challenges is the responsibility of the parties litigating the case. We may neither add nor subtract from the record; we must accept it as it is. Thus, "[w]hen confronted with a motion for summary judgment, a party who bears the burden of proof on a particular issue, may not rest on its pleadings, but must affirmatively demonstrate by specific factual allegations, that there is a *genuine* issue of material fact which requires trial." *Beard v. Whitley County, REMC*, 840 F.2d 405, 410 (7th Cir. 1988) (emphasis in original). As we have also noted:

> *"A district court need not scour the record to make the case of a party who does nothing . . . [C]ourts will not discover that the movants slighted contrary information if opposing lawyers sit on their haunches; judges may let the adversary system take its course."* (emphasis added) *Herman v. City of Chicago*, 870 F.2d 400, 404 (7th Cir. 1989).

Id. at 887-88.

The plaintiffs appear to rest their case on the fact that there are no black supervisors in the Boulevard and Landscape Division of the City of Milwaukee Department of Forestry. They also maintain there are proportionately more blacks in the lower paying Boulevard and Landscape Division than in the higher paying Tree Maintenance Division. As to the claim regarding the want of black supervisors they argue without any proof at all that the promotional mechanisms, i.e., written tests and oral interviews, cause the rational disparity.

In *Wards Cove Packing Co., Inc. v. Atonio*, 109 S. Ct. 2115 (1989), the Supreme Court clarified the elements of a prima facie disparate impact case that the Title VII plaintiff must establish, along with the relative burdens of the parties once the prima facie case is made. *Wards Cove* expanded on *Watson v. Fort Worth Bank and Trust*, 108 S. Ct. 2777 (1988) in which it was held that "the plaintiff's burden in establishing a prima facie case goes beyond the need to show that there are statistical disparities in the employer's workforce." Id. at 2788.

Wards Cove involved salmon canneries in Alaska in which the unskilled "cannery jobs" were mainly filled by non-whites, while the skilled "non-cannery jobs" were predominantly filled with white workers. The court held that "[r]acial imbalance in one segment of an employer's workforce does not, without more, establish a prima facie case of disparate impact with respect to the selection of workers for the employer's other positions . . ." *Wards Cove*, 109 S. Ct. at 2122. Thus, "the percentage of non-white workers found in other positions in the employer's labor force is irrelevant to the question of a prima facie statistical case of disparate

impact." Id. at 2123. The court further stressed that in light of *Watson*, the question of causation is an essential element of a prima facie case. This requires that the Title VII plaintiff must show not only a racial imbalance in the workforce but "must demonstrate that it is the application of a specific or particular employment practice that has created the disparate impact under attack." Id. at 2124. Other than some vague allegations in the depositions and affidavits that applicants for promotion to supervisory positions should not be required to take tests, there is no specificity as to the challenged employment practice or as to how the challenged practice caused a racial imbalance.

In short, the defendants have satisfied the court that there is no genuine issue of material fact present in the record before me which would lead a trier of fact to conclude that the defendants are guilty of employment discrimination. The court has been unable to find any assertions that qualified blacks have applied to the Tree Maintenance Division and have been denied the opportunity. On the contrary, it appears that many of the boulevard workers choose not to be employed in a division in which the workers are required to perform their functions at dangerous altitudes.

Defendants have further satisfied the court, although in the absence of a prima facie case they are not required to do so, that the pay differences between the Boulevard Division and the Tree Division are justified by the dangers involved. It further appears that the defendants are making genuine efforts to employ qualified minorities in supervisory positions. The court is sympathetic with the situation of plaintiff Thomas Wynn, who is obviously a very qualified individual. The court must find, however, that there is no genuine issue of fact with respect to the City's decision not to promote him to supervisor.

Many of the plaintiffs who were deposed expressed dissatisfaction with the fact that plaintiff Eddie Martin was not a supervisor because of his general knowledge and his longevity in the department. Again, however, there has been no showing that the tests which Mr. Martin has consistently failed are in any way skewed to have a disparate impact upon the promotion of blacks. The court must find that when

employment requires the use of machinery and potentially dangerous chemicals such as pesticides, it is entirely reasonable to require tests. In the absence of any showing that such tests lead to racial discrimination, I must find in favor of the defendants. Needless to say, the plaintiffs have also failed to support their claim under 42 U.S.C. §§ 1981, 1983 and 1985(2). Accordingly,

IT IS ORDERED that the defendants' motion for summary judgment in the above-consolidated case be and hereby IS GRANTED. The clerk is ordered to enter judgment in favor of the defendants and against the plaintiffs.

Done and Ordered in Chambers at the United States Courthouse, Milwaukee, Wisconsin this 14th day of February, 1990.

Thomas J. Curran
United States District Judge

No. 90-1239

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In The

Supreme Court of the United States

October Term, 1990

THE UNITED ASSOCIATION OF BLACK LANDSCAPERS, EDDIE MARTIN, THOMAS WYNN, HAROLD BURRIS, LLOYD MAYWETHER, JOSE ROSALES, CHARLES BURTON, RUFUS POWELL, JOHN DOE, and JANE DOE, and THOMAS H. WYNN, JR.,

Petitioners,

v.

CITY OF MILWAUKEE, DEPARTMENT OF PUBLIC WORKS, BUREAU OF FORESTRY of the City of Milwaukee, ROBERT SKIERA, City Forester for the City of Milwaukee, RICHARD MEYER, Assistant City Forester for the City of Milwaukee, JOHN NORQUIST, Mayor of the City of Milwaukee, E. FRANK BRIDGES, President, Board of City Service Commissioners of the City of Milwaukee, CITY SERVICE COMMISSION OF THE CITY OF MILWAUKEE,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of
Appeals For The Seventh Circuit

BRIEF IN OPPOSITION

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No. 90-1239

In The

Supreme Court of the United States

October Term, 1990

THE UNITED ASSOCIATION OF BLACK LANDSCAPERS, EDDIE MARTIN, THOMAS WYNN, HAROLD BURRIS, LLOYD MAYWETHER, JOSE ROSALES, CHARLES BURTON, RUFUS POWELL, JOHN DOE, and JANE DOE, and THOMAS H. WYNN, JR.,

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v.

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Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Respondent, the City of Milwaukee (hereinafter the City), accepts the petitioner's, the United Association of Black Landscapers, et al. and Thomas H. Wynn, Jr. (hereinafter UABL), Statement of the Case. The City further accepts UABL's Appendix and will make reference to it in the same manner used by UABL.

REASONS FOR DENYING PETITION FOR A WRIT OF CERTIORARI

Rule 56(e) of the Federal Rules of Civil Procedure has been in the past regularly applied to employment discrimination cases, and nothing in Rule 56(e) or Title VII of the 1964 Civil Rights Act suggests that summary judgment is an inappropriate means of disposing of utterly meritless discrimination claims.

Rule 56(e) of the Federal Rules of Civil Procedure provides:

> "FORM OF AFFIDAVIT; FURTHER TESTIMONY; DEFENSE REQUIRED. Supporting an opposing affidavit shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify that the matter stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The Court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an *adverse party may not rest upon the*

> *mere allegations or denials of his pleadings, but his response by affidavits are otherwise provided in this rule, must set forth specific facts showing there is a genuine issue for trial.* If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Federal Rules of Civil Procedure 56(e). (Emphasis added).

Even in petitioning for *certiorari*, the petitioners still rely upon the verified allegations of their complaint and the "assertions" a fact made in the affidavits. (Petition for Certiorari, pp. 4-5). It is clear from a reading of Rule 56(e) of the Federal Rules of Civil Procedure that mere "assertions" of facts and allegations in verified complaints do not constitute requisite specific facts showing there is a genuine issue for trial. That has been underscored by a trilogy of cases decided by this Court, starting with *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986), ruling that an issue of fact to be "genuine" must have a real basis in the record. 475 U.S. 587, 106 S.Ct. 1356, 89 L.Ed.2d 552.

In *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986), this Court determined that, " . . . the plain language of Rule 56(c) mandates the entry of summary judgment . . . against the party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and upon which that party will bear the burden of proof at trial." 477 U.S. 322, 106 S.Ct. 2552-53, 91 L.Ed.2d 273.

Further, the matter of *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) provides guidance on the level of factual data which the party opposing the motion must show. In that case, which

was a constitutionally-privileged libel case, this Court required that a plaintiff in opposing a motion for summary judgment must demonstrate in their submission to oppose the motion for summary judgment that actual malice existed and that they would have to prove that by clear and convincing evidence. This Court further ruled that a "genuine" disputed issue of fact is one created where "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." 477 U.S. 248, 106 S.Ct. 2510, 91 L.Ed.2d 211-212. Mr. Justice White compared the motion for summary judgment with that of a directed verdict, noting that the timing of the two motions is different. The directed verdict occurs at the close of plaintiff's case where as summary judgment occurs prior to the commencement of the trial. The purpose, however, is the same – to test if there are facts which show existence of an issue for the jury.

This Court determined in *Celotex v. Catrett, supra,* "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.' " 477 U.S. 327, 106 S.Ct. 2555, 91 L.Ed.2d 276.

Petitioner does not cite any authority for the proposition that summary judgment is inappropriate when applied to a Title VII case. Indeed, a plethora of decisions which have emanated from the various circuits all lead inevitably to the conclusion that summary judgment is an appropriate means of disposing of discrimination cases where no genuine material issues of fact are presented by the parties. *Cartagena v. Secretary of the Navy,* 618 F.2d 130

(1st Cir. 1980); *Hood v. New Jersey Department of Civil Service*, 680 F.2d 955 (3d Cir. 1982); *Lovelace v. Sherwin-Williams Co.*, 681 F.2d 230 (4th Cir. 1982); *Gordon v. Watson*, 622 F.2d 120 (5th Cir. 1980); *Ackerman v. Diamond Shamrock Corp.*, 670 F.2d 66 (6th Cir. 1982); *Huhn v. Koehring Company*, 718 F.2d 239 (7th Cir. 1983); *Steckl v. Motorola, Inc.*, 703 F.2d 392 (9th Cir. 1983); *Pace v. Southern Railway System*, 701 F.2d 1383 (11th Cir. 1983); *Metrocare v. Washington Metropolitan Area Transit Authority*, 679 F.2d 922 (D.C. Cir. 1982).

Lastly, it cannot help but be observed that in their petition for certiorari in this matter, the petitioners have not cited one fact which was in any way slighted by the District Court or the Court of Appeals and which tends to show that discrimination has been or is occurring to any of the plaintiffs in this matter or to any of the members of the putative class. In effect, petitioners have now had "three kicks at the cat," they have had an opportunity in the District Court, they have had an opportunity in the Seventh Circuit, and they have had an opportunity here to demonstrate those disputed facts which entitle them to having the respondents' motion for summary judgment denied and this case go on to trial. Yet nowhere have they cited any such facts which taken together would even begin to demonstrate that they would have a *prima facie* case of employment discrimination which has not in any way been refuted by the respondents.

THE 7TH CIRCUIT CORRECTLY INTERPRETED THIS COURT'S HOLDING IN *WARDS COVE PACKING CO. V. ATONIO*, 490 U.S. ___, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989).

In that case Mr. Justice White, speaking for a majority of the Court, determined that not only must the plaintiffs demonstrate there was observable disparate impact, but that they must identify and isolate the means and methods by which the unlawful disparate impact took place in order to establish a *prima facie* case of employment race discrimination.

The petitioners have nowhere demonstrated even the existence of an observable disparate impact. Nor have they identified what caused it, were it to exist. Indeed, as the Seventh Circuit noted in its opinion, Mr. Stebbins, the petitioner's expert witness, did not perform his own analysis, rather merely questioned the analysis of Dr. Friedland (the respondent's expert witness) in determining that there was altogether insufficient data to support a case of disparate impact. (Appendix of Pet. for Writ of Certiorari, p. 4). Thus, the petitioners fall squarely within the analysis of Mr. Justice White in *Wards Cove* – they have failed to establish a statistically relevant disparate impact and on top of that have failed to demonstrate that any such observable statistical disparate impact is attributable to any of the testing mechanisms which Mr. Martin and Mr. Wynn so vehemently dislike.

CONCLUSION

For the foregoing reasons the petition for the writ of certiorari should be denied, this matter should be dismissed.

Respectfully submitted at Milwaukee, Wisconsin this 12th day of February, 1991.

Respectfully submitted,

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